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Wife Cannot Sue Husband at Law for Tort Against Her Property Interests - Fernandez v. Fernandez

J. Paul Rogers

Wife Cannot Sue Husband At Law For Tort Against Her Property Interests

Fernandez v. Fernandez[1]

Plaintiff-appellant brought suit against her husband, from whom she was living apart, in replevin to recover certain of her chattels and damages for their detention. The husband demurred to the declaration on the ground that a wife could not sue her husband at law for the return of property. The demurrer was sustained on that ground. On appeal from the Circuit Court for Washington County, the case was remanded for further proceedings without affirmance or reversal.[2]

The appellant contended on appeal that the Maryland rule against a wife's suing her husband at law for personal injuries should not be extended to a case involving property interests and cited authority from other jurisdictions in

[1] 214 Md. 519, 135 A. 2d 886 (1957).

[2] Under MD. RULE 871(a), allowing such procedure when the interests of justice can best be served thereby.

accord with this contention. Although the Court of Appeals recognized "that the authorities generally hold as she contends",[3] the Married Women's Property Act in this state has been so construed as to prevent the following of the appellant's contention without reversing prior decisions of this Court.[4]

One of the earlier Maryland cases construing the Act was the case of *Furstenburg v. Furstenburg*,[5] which involved an action by a wife against her husband for personal injuries received in an automobile accident. The Court of Appeals construed the Code provision[6] in regards to this type of suit to do no more than allow a wife to maintain a suit in her own name and without joining her husband against a third person. The statute, being in derogation of the common law, was narrowly construed; at common law this type of suit was not allowed and since the statute does not specifically authorize it, a wife cannot sue her husband in tort for personal injuries. In arriving at this conclusion, the Court was aided in their reasoning by Article 45, Section 20,[7] which was passed two years after Section 5, and which specifically authorized a wife to make a contract with her husband and to sue him on that contract. The specific authorization of a suit on a contract between husband and wife carries the implication that Article 45, Section 5, was not intended to authorize a wife to sue her husband. Otherwise, Article 45, Section 20, would be superfluous.

Five years after the *Furstenburg* case, the case of *David v. David*[8] was decided. There a wife brought suit for personal injuries against her husband and his co-partner

[3] *Supra*, n. 1, 521.

[4] *Ibid.*:

"The cases in Maryland have interpreted the act with such strictness and have given it such limited effect that we find ourselves unable to follow the authorities elsewhere without overruling our prior decisions, despite the appeal to reason and convenience that the rule urged upon us has."

[5] 152 Md. 247, 136 A. 534 (1927).

[6] 4 MD. CODE (1957), Art. 45, Sec. 5:

"Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried; . . . ."

[7] 4 MD. CODE (1957), Art. 45, Sec. 20:

"A married woman may contract with her husband and may form a co-partnership with her husband or with any other person or persons in the same manner as if she were a feme sole, and upon all such contracts, partnership or otherwise, a married woman may sue and be sued as fully as if she were a feme sole."

[8] 161 Md. 532, 157 A. 755, 81 A. L. R. 1100 (1932), noted 1 MD. L. REV. 65 (1936).

but was unsuccessful. Relying on the *Furstenburg* case and reasoning that each partner was severally liable for the negligent acts of the partnership, the Court concluded that a wife could not sue a partnership of which her husband was a member for injuries received as a result of the negligence of the partnership. The reasoning of the Court dealt with the presumed legal identity of husband and wife which could only be destroyed by express legislative declaration and,

> ". . . upon the broader sociological and political ground that it would introduce into the home, the basic unit of organized society, discord, suspicion and distrust, and would be inconsistent with the common welfare."[9]

With particular reference to this preceding quotation, it is interesting to note another statement by the Court in the same opinion:

> "Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus,* if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce."[10]

Although these remedies, at least the criminal remedies, are less likely to be resorted to, one may well ask if they are any the less detrimental to the harmony of the family than a personal injury suit would be, and in particular, a divorce proceeding which completely destroys the family relationship. Of course, marital discord will usually be present before any of the aforementioned remedies are resorted to, and will normally be present before a wife files suit against her husband in any court. There are exceptions to this, however, such as suits to try title to land or where the primary consideration is collecting on an insurance policy, but in such cases marital discord could hardly be said to be a usual forerunner. Where insurance is involved, the insurance company which insured against tort liability should be held liable as in any case involving a third person, and, though there might seem to be a greater danger of fraud on the insurer, this is probably no greater than in the case of a suit by a guest against the driver of an automobile.

[9] *Ibid.*, 535.
[10] *Ibid.*, 539.

These two cases were followed by *Riegger v. Brewing Company*[11] wherein a wife was denied a cause of action against her husband's employer for injuries sustained by her as a result of the husband's negligence while acting within the scope of his employment. The court pointed out that if the employer was held liable, he would have a cause of action over against the husband, the actual wrongdoer.

The preceding cases represent the principal development in the construction of this aspect of the Married Women's Act, and were the cases which the Court of Appeals felt bound them in the principal case. However, each dealt with a personal injury as opposed to a tort against property interests. This is the first case to go to the Court of Appeals wherein a wife brought suit against her husband, *at law,* for an injury to her property interests.[12] The right of a wife to sue *in equity* for the protection of her property has been recognized and accepted in Maryland.[13] In *Cochrane v. Cochrane,*[14] wherein a wife filed a bill of complaint against her husband for an accounting, discovery and property in the hands of the husband belonging to the wife, the Court of Appeals said:

> "It has long been settled, in this State, that the relation of debtor and creditor may exist between husband and wife, and as, under the Code, the wife is vested with the legal title to her separate estate, she can maintain an action for the recovery, security or protection of her property. . . .
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> "In *Wilson v. Wilson,* 86 Md. 638, decided on January 5th, 1898, it was said that the weight of authority seems to be that either the husband or wife can sue

[11] 178 Md. 518, 16 A. 2d 99, 131 A. L. R. 307 (1940). The more recent case of Gregg v. Gregg, 199 Md. 662, 87 A. 2d 581 (1952), which denied a wife the right to recover from her husband sums expended by her for necessaries during separation, called the grounds for denying the action artificial, especially when discord had already entered into the home, but the Court considered itself bound by the prior decisions, much the same as in the principal case.

[12] *Cf.:* Barton v. Barton, 32 Md. 214 (1870) and Odend'hal v. Devlin, 48 Md. 439 (1878), both of which are proceedings at law. In the first case a widow was allowed to maintain an action against the executor of her deceased husband for, among other things, the value of securities forming part of her separate estate, and in the second a creditor of the wife (even though a creditor normally steps into the shoes of his debtor) was allowed to garnish part of her separate estate in the hands of the husband. It would have been just as easy in the second case to find the promotion of marital discord as it was in the principal case.

[13] "The jurisdiction of equity to enforce an accounting between husband and wife, or to appoint a receiver, has been recognized in many cases". Smith v. Smith, 211 Md. 366, 369, 127 A. 2d 374 (1956), involving a bill of complaint filed by an estranged wife against her husband for an accounting and the sale of real estate, etc.

[14] 139 Md. 530, 115 A. 811 (1921).

> the other in equity for protection of his or her property."[15]

The *Cochrane* case contains a *dictum* based on its interpretation of Article 45, Section 5, that the suit could also be brought at law.[16] This was erroneously cited as a holding in 1 MARYLAND LAW REVIEW 65, which fact was pointed out by Judge Hammond in the principal case, though he refused to follow the *dictum.*

As evidenced by the much cited case of *Masterman v. Masterman*[17] equity will protect even the interest of one spouse in property held by the spouses as tenants by the entireties from harmful action by the other spouse. The case, though before the Court on demurrer, recognized the right of a wife to compel her estranged husband to apply his portion of the proceeds of an insurance policy to the restoration of the property.

Is there any reason for this distinction between a suit by one spouse against the other spouse in equity and at law? To the layman, a suit is a suit, and the effect is the same whether brought at law or in equity. As was previously pointed out, the remedies suggested by the *David*[18] case are, at best, a last resort and very unsatisfactory. With reference to the marital discord element, it is possible for the equity courts to cause more discord than the law courts in that equity, where the suit must be brought, can enforce its decree by imprisonment of the defendant's person. Without arguing further against the inconsistency of the Maryland position, let it suffice to say that currently in Maryland a wife may not sue her husband at law for a tort to her property interests. Such suit must be brought in equity.[19] Nor is Maryland alone in this position.[20]

In marked contrast to the Maryland position, the District of Columbia in *Notes v. Snyder,*[21] decided under a

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[15] *Ibid.*, 532.

[16] *Supra*, n. 14, 534.

[17] 129 Md. 167, 98 A. 537 (1916).

[18] Text, *circa.*, ns. 8-10. 161 Md. 532, 157 A. 755, 81 A. L. R. 1100 (1932), noted 1 MD. L. REV. 65 (1936).

[19] "The trial court noted specifically that his decision was without prejudice to the right of appellant to bring a new proceeding in equity but we see no reason why the case should not have been transferred from the law to the equity side of the Circuit Court in which it was brought and appropriate amendments to the pleadings permitted. Maryland Rule 515." Fernandez v. Fernandez, 214 Md. 519, 524, 135 A. 2d 886 (1957).

[20] See Heckman v. Heckman, 215 Pa. 203, 64 A. 425 (1906); Smith v. Smith, 4 N. J. Misc. 596, 133 A. 860 (1926); Anthony v. Anthony, 135 Me. 54, 188 A. 724 (1937); and Easterly v. Wildman, 87 Fla. 73, 99 So. 359 (1924).

[21] 4 F. 2d 426 (D. C. App., 1925).

statute almost identical with Article 45, Section 5, though without the added influence of Article 45, Section 20, said, "[w]e are of the opinion that either spouse may prosecute an action in replevin against the other in the Courts of the District".[22] The Court reasoned that the Married Women's Property Act gave the wife a separate estate and the right to sue separately. "There is no public policy which would forbid the bringing of such actions, whereas the right to bring them is necessary to carry out the plain intent of the enabling law."[23] However, a right of recovery is dependent upon proof of a right to the immediate and exclusive possession of the property at the time of the commencement of the action, and because of that requirement, plaintiff failed as the property was owned jointly. Again in contrast to the Maryland position, the District in the above case was careful to distinguish the *Notes* case from cases involving personal injuries. The public policy aspects were considered to be much different.

Much support can be found for the District view both in case law[24] and among the text writers.[25]

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[22] *Ibid.*, 426.

[23] *Ibid.*, 427.

[24] See Walker v. Walker, 215 Ky. 154, 284 S. W. 1042 (1926), an action of forcible detainer; Cook v. Cook, 125 Ala. 583, 27 So. 918 (1900), ejectment from separate estate; Hedlund v. Hedlund, 87 Col. 607, 290 P. 285 (1930), suit to recover specific chattels (see also Rains v. Rains, 97 Col. 19, 46 P. 2d 740 (1935), wherein a wife was allowed to maintain an action for personal injuries against her husband); Eshom v. Eshom, 18 Ariz. 170, 157 P. 974 (1916), trover; McDuff v. McDuff, 45 Cal. App. 53, 187 P. 37 (1919), ejectment; Buckingham v. Buckingham, 81 Mich. 89, 45 N. W. 504 (1890), ejectment; Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598 (1908), trover; Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206 (1896), decided under a statute giving the wife the same rights as her husband has; Hartz v. Hartz, 13 Ga. App. 401, 79 S. E. 230 (1913), trover; Eddleman v. Eddleman, 183 Ga. 766, 189 S. E. 833, 836, 109 A. L. R. 877 (1937), trover by husband, wherein the court said:

> "While the statutes of this state, . . . do not purport to change the common law in respect to personal torts committed by one spouse against the other, they do change the common law in respect to property rights of the wife. With respect to such rights she is a feme sole, and may be sued by her husband in a bail-trover proceeding for recovery of his personal property converted by her."

Bennett v. Bennett, 37 W. Va. 396, 16 S. E. 638 (1892), stating that while a wife cannot sue her husband at law, the husband can confess judgment in favor of the wife and it will be valid unless set aside for fraud; Edmonds v. Edmonds, 139 Va. 652, 124 S. E. 415 (1924), unlawful detainer; Madget v. Madget, 85 Ohio App. 18, 87 N. E. 2d 918 (1949), suit for declaratory judgment of rights in proceeds of insurance check; Crater v. Crater, 118 Ind. 521, 21 N. E. 290 (1889), ejectment, but note statutory authorization; Bruner v. Hart, 178 Okla. 222, 62 P. 2d 513 (1936), *dictum* to effect that wife can sue husband in replevin but goods found not to be part of her separate estate. See also annotations in 109 A. L. R. 882 and 41 A. L. R. 1054.

[25] PROSSER, TORTS (2nd Ed., 1955), §101.

> "Since the primary object of these statutes was to free the wife from the husband's control of her property, the courts have generally agreed that they enable her to maintain an action against him for any tort against her property interests. Thus she may recover from him for conversion or detention . . . . Likewise, since the statutes destroy the unity of the persons and place them upon an equality, it is held that the husband may recover from the wife for similar torts as to his property."[26]

In nearly every case allowing one spouse to sue the other for a tort to property interests, marital discord has been present, and in many of the cases it has been stated as a prerequisite to bringing the action. In the principal case it was present and it seems very doubtful that the case would have ever come to trial had it not been present.

In conclusion, the Maryland position seems unnecessarily restrictive. It is based primarily on cases involving personal injury torts and upon an interpretation of the Married Women's Property Act which is very limited and narrow. The principal case was an ideal case for reaching an opposite result. The Court itself considered it appealing from the appellant's viewpoint, which was supported by the *dictum* in the *Cochrane* case, as well as the weight of authority in other jurisdictions. However, the Court saw fit to saddle itself with this narrow interpretation of the statutes and is now truly bound by *stare decisis*. The remedy lies with the Legislature.

J. PAUL ROGERS

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[26] *Op. cit. ibid.*, 672.